IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 120 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DIPAKBHAI SHANTILAL MAGIYA

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 120 of 2003

MR YOGESH S LAKHANI for Petitioner No. 1

MS NANDINI JOSHI, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE KSHITIJ R.VYAS

Date of decision: 22/05/2003

ORAL JUDGEMENT

The petitioner in this petition under Article 226 of the Constitution of India, has challenged the legality

of the order of his detention dated 7.11.2002 passed by the District Magistrate, Bhavnagar, respondent No.1 herein under the provisions of the Gujarat Prevention of Anti Social Activities Act, 1985 (in short, 'the PASA Act'). By the said impugned order, the detaining authority has branded the petitioner as a 'Property Grabber' within the meaning of Section 2(h) of the PASA Act.

Learned Counsel Mr.Lakhani appearing for the petitioner, though assailed the order of detention on many grounds, it is not necessary for me to consider all the grounds since the petition is capable of being disposed of on the ground that there is nothing indicative that either public order is disturbed or that it is likely to be disturbed because of the alleged activity of the petitioner.

Learned Counsel for the petitioner submits that there is no subjective satisfaction by the detaining authority that public order within the meaning of Section 3(4) of the PASA Act is disturbed or is likely to be disturbed. Developing the said contention, learned Counsel submits that no documentary evidence which reveals that public order is disturbed or is likely to be disturbed. Learned Counsel further submits that the detaining authority has tried to explain his subjective satisfaction by filing affidavit and has tried to support the same, which is not there in the grounds of detention, which is not permissible.

Learned AGP Ms.Nandini Joshi, after inviting my attention to the grounds of detention, submits that the petitioner has illegally and unauthorisedly encroached upon the Government land bearing Survey No. 447/1 of village Vadwana and has put up unauthorised construction thereon and that even though the illegal construction was removed by the authorities on 19.12.2001, the petitioner again encroached upon 651.05 sq.mtr. of Government land and made unauthorised construction over the same. In the submission of learned AGP, in the various statements, the petitioner admitted that he was aware of the fact that the said land is Government land and in spite of that, he has encroached upon the land and made illegal construction. Finally, it is submitted that from the statements of other persons that even though the petitioner has stated that he has purchased the lands from those persons, they have not sold the same to the petitioner and he has illegally taken possession of the land not belonging to him, but belonging to the Government and made unauthorised construction of

structures thereon for making illegal financial gains. Thus, according to the learned AGP, the sponsoring authority was justified in making the proposal to detain the petitioner and on receipt of the proposal along with the material from the sponsoring authority for detention of the detenu, the detaining authority arrived at the subjective satisfaction that the petitioner is a 'Property Grabber' as defined under Section 2(h) of the PASA Act.

I have gone through the grounds of detention. It is a matter of surprise that the detaining authority has nowhere recorded the subjective satisfaction in clear terms that the activities or any of the activities of the petitioner were prejudicial for maintenance of public order. Reading the grounds of detention, it is clear that the order of detention is passed against the petitioner being a 'Property Grabber', in the interest of public order. Except this, there is no observation in the whole of the grounds of detention by the detaining authority that the activities of the petitioner were prejudicial for maintenance of public order. True, in the affidavit-in-reply, the detaining authority has deposed that the activities of the petitioner were prejudicial for maintenance of public order. This Court, in the case of Hanskamal A.Grover v. State of Gujarat and ors., reported in 1999 (3) G.L.R. 2516, has ruled that initial lacuna in the grounds of detention or the detention order cannot be cured subsequently by filing a counter-affidavit which is nothing but an after-thought. If the detaining authority has entertained subjective satisfaction while formulating the grounds of detention that the activities of the petitioner were prejudicial for maintenance of public order, he could have so disclosed in express words in the grounds of detention. That has not been done and hence, this defect cannot be cured by subsequently filing a counter-affidavit. In paragraph 30 of the said decision, it is also observed that, even within the extended meaning of disturbance of public order as contained in Explanation to sub-sec.(4) of Sec.3 of PASA such activities could not be said to have created sense or feeling of insecurity or alarm or danger to the property of public at large.

Applying the ratio of the above decision in the present case, it can safely be concluded that by no stretch of imagination it can be said that the activities of the petitioner were prejudicial for maintenance of public order. The petition is required to be allowed on this ground only.

Before parting, I would like to record the statement made by learned Counsel Mr.Y.S.Lakhani for the petitioner that the petitioner shall hand over vacant and peaceful possession of the entire encroached Government waste land bearing Survey No. 447/1 of village Vadwana to the authorities concerned and shall file an undertaking before the authorities within two weeks from today that, henceforth, he will not directly or indirectly encroach upon any of the Government land of village Vadwana. The petitioner may do so.

The petition is accordingly allowed. The impugned order of detention dated 7.11.2002 is hereby quashed and set aside. The petitioner detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule is made absolute. Direct service today is permitted.

(Kshitij R. Vyas, J.)

Sreeram.